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## CPLR 3012(b): Retention of Untimely Complaint for 18 Days Held Not To Constitute a Waiver of Right To Move for Dismissal

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## ARTICLE 30 — REMEDIES AND PLEADING

*CPLR 3012(b): Retention of untimely complaint for 18 days held not to constitute a waiver of right to move for dismissal.*

CPLR 3012(b) provides that where the plaintiff elects to serve only a summons, the defendant may properly demand a copy of the complaint. Thereafter, failure of the plaintiff to serve the complaint within 20 days of the demand can result in the dismissal of the action.<sup>150</sup> Any such dismissal is discretionary with the court.<sup>151</sup> In passing upon a CPLR 3012(b) dismissal motion, the court must consider (1) the length of time of the delay, and (2) whether the motion for dismissal was made prior or subsequent to the receipt of the late complaint.<sup>152</sup>

In *Johnson v. Johnson*,<sup>153</sup> the Appellate Division, Third Department, affirmed a ruling of the Supreme Court, Montgomery County, which had granted defendants' motion to dismiss the complaint pursuant to CPLR 3012(b).<sup>154</sup> The action was based on an alleged breach of a warranty deed, fraud, and deceit. No complaint was served with the summons, and the defendants served a notice of appearance with a demand for the complaint. Four months after defendants' demand, plaintiff served the complaint. Defendants did not reject the com-

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by the Court of Appeals in *Ray*, has been signed into law and will be effective Sept. 1, 1975. See N.Y. Times, June 19, 1975, at 42, col. 3.

<sup>150</sup> CPLR 3012(b) provides:

If the complaint is not served with the summons, the defendant may serve a written demand for the complaint. If the complaint is not served within twenty days after service of the demand, the court upon motion may dismiss the action. A demand or motion under this section does not of itself constitute an appearance in the action.

Unlike CPA 257, CPLR 3012(b) does not require that service of the demand for the complaint be made within 20 days of the service of the summons.

<sup>151</sup> When the defendant makes a motion to dismiss pursuant to CPLR 3012(b), the plaintiff, to prevent dismissal, must demonstrate to the court that there was a valid excuse for the delay in serving the complaint and that he has a meritorious cause of action. 3 WK&M ¶ 3012.15.

In the exercise of its discretion, the court need not dismiss the action if the failure to serve the complaint is unavoidable and no delay in prosecution has occurred. However, an inadequate explanation of the delay will result in a dismissal of the action. *Id. Compare Ferrentino v. Farragut Gardens No. 5, Inc.*, 35 App. Div. 2d 815, 316 N.Y.S.2d 673 (2d Dep't 1970) (mem.) (dismissal granted where attorney allegedly misplaced plaintiff's file and no meritorious claim was demonstrated), *with McDonald v. King's Dep't Store, Inc.*, 27 App. Div. 2d 597, 275 N.Y.S.2d 707 (3d Dep't 1966) (per curiam) (dismissal denied where attorney encountered research problems and defendant failed to show prejudice).

<sup>152</sup> See generally 3 WK&M ¶ 3012.15. Although filing the motion to dismiss after receiving the untimely complaint will not in and of itself require denial of the motion, it has been suggested that the defendant's motion for dismissal will be muted, at least psychologically, by such a delay. 7B MCKINNEY'S CPLR 3012, commentary at 590 (1974).

<sup>153</sup> 45 App. Div. 2d 899, 357 N.Y.S.2d 208 (3d Dep't 1974) (mem.).

<sup>154</sup> *Id.* at 900, 357 N.Y.S.2d at 209. Plaintiff had sought by cross-motion to compel defendants to accept the complaint. *Id.* at 899, 357 N.Y.S.2d at 208.

plaint nor make a CPLR 3012(b) motion to dismiss until 18 days after its receipt.

The issue presented to the Third Department was whether the 18-day retention of the complaint by defendants constituted a waiver of their rights under CPLR 3012(b).<sup>155</sup> Arguably, defendants' retention of the complaint could be considered a waiver, as well as the equivalent of granting plaintiff an extension of the statutory time limit for service.<sup>156</sup> However, the court rejected this reasoning and affirmed, as a reasonable exercise of the lower court's discretion, the dismissal of the action. In a memorandum decision, the appellate court stated that in view of the inordinate delay on the plaintiff's part, retention by defendants for 18 days did not constitute a waiver of their rights.<sup>157</sup>

A seemingly contradictory position was taken by the Fourth Department in *Lucenti v. City of Buffalo*,<sup>158</sup> wherein defendant's motion for dismissal was denied, despite plaintiff's nearly three-year delay in serving the complaint. Defendant received the late complaint while its motion to dismiss was pending, but failed to reject it. Instead, the complaint was included as part of defendant's record on appeal. In a memorandum decision, the court concluded that the "retention of the complaint was a waiver of the untimely service thereof and deprived defendant of the right to relief under CPLR 3012."<sup>159</sup>

The seemingly contradictory holdings in *Johnson* and *Lucenti* can, in some measure, be reconciled through an examination of the facts surrounding each case. The defendant in *Lucenti* failed to reject the complaint received while his motion to dismiss under CPLR 3012(b) was pending. Having retained the complaint, the defendant was in a poor position to continue to seek relief for plaintiff's failure

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<sup>155</sup> Plaintiff's attorney argued that a delay of three or four months in issuing the complaint was the general practice of attorneys in the area. The court rejected this reasoning, stating that such a custom was inadequate grounds for "ignoring the requirements of the CPLR." *Id.* at 899, 357 N.Y.S.2d at 209.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> 29 App. Div. 2d 833, 287 N.Y.S.2d 612 (4th Dep't 1968) (mem.), discussed in *The Quarterly Survey*, 43 ST. JOHN'S L. REV. 302, 322 (1968).

<sup>159</sup> 29 App. Div. 2d at 834, 287 N.Y.S.2d at 613, citing *Graziano v. Albanese*, 24 App. Div. 2d 712, 263 N.Y.S.2d 20 (1st Dep't 1965) (per curiam) (prompt rejection of untimely complaint resulted in dismissal of the action); *Wakschal v. Century Estates, Inc.*, 10 App. Div. 2d 891, 201 N.Y.S.2d 236 (2d Dep't 1960) (mem.) (action dismissed due to unexplained delay of over two years in the service of the complaint); *Burns v. Meister*, 141 App. Div. 674, 125 N.Y.S. 916 (2d Dep't 1910) (motion requesting leave to serve a complaint denied where original untimely complaint was promptly returned); *Rogers v. Rockwood*, 59 Hun 628, 13 N.Y.S. 939 (Sup. Ct. 5th Dep't 1891) (retention of the complaint constituted a waiver of the irregularity in the method of service).

to serve a timely complaint. In *Johnson*, however, the defendants' rejection of the untimely complaint, although it did not immediately follow receipt of the complaint, was sufficiently prompt to avoid a waiver of their rights under CPLR 3012(b).<sup>160</sup>

The *Johnson* decision suggests that the Third Department will not be hasty in concluding that a defendant who does not immediately return an untimely complaint has thereby waived his objection to such late service. Regrettably, *Johnson*, like previous decisions,<sup>161</sup> fails to articulate a standard by which trial courts can determine if defendants have waived their rights under CPLR 3012(b). This is particularly unfortunate in view of the discretion vested in a court in passing upon a motion under CPLR 3012(b).<sup>162</sup> Hopefully, appellate courts in the near future will set forth guidelines to assist trial courts in evaluating such motions.

The need for sound judicial discretion in this area is highlighted by an examination of the consequences that proceed from a dismissal pursuant to CPLR 3012(b). Such a dismissal results in the entry of a default judgment.<sup>163</sup> Moreover, since a CPLR 3012(b) dismissal has been held to constitute a "neglect to prosecute,"<sup>164</sup> the plaintiff is not entitled to the six-month extension of the statute of limitations provided for in CPLR 205(a).<sup>165</sup> Finally, while a dismissal pursuant to CPLR 3012(b) has the same effect as a dismissal for neglect to prosecute under CPLR 3216, the plaintiff is not entitled to the preliminary

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<sup>160</sup> Cf. 7B MCKINNEY's CPLR 3012, commentary at 590 (1974), wherein a similar rationale was suggested as a possible distinction between *Lucenti* and *Wilkening v. Fogarty*, 40 App. Div. 2d 1031, 338 N.Y.S.2d 985 (2d Dep't 1972) (mem.). In *Wilkening*, the complaint was served almost 30 months after the summons and defendant returned it within a week of its receipt. Moreover, plaintiffs did not offer a reasonable excuse for the delay and failed to file an affidavit of merits. The Second Department held that under these circumstances, defendant's motion to dismiss should have been granted. *Id.*, 338 N.Y.S.2d at 986.

<sup>161</sup> See cases cited note 159 *supra*.

<sup>162</sup> See note 151 and accompanying text *supra*.

<sup>163</sup> 3 WK&M ¶ 3012.15.

There is authority to the effect that dismissal under CPLR 3012(b) requires no showing by the defendant of prejudice stemming from the untimely service of the complaint. See *Kroner v. Flora*, 35 App. Div. 2d 835, 317 N.Y.S.2d 459 (2d Dep't 1970) (mem.).

<sup>164</sup> See *Wright v. Farlin*, 42 App. Div. 2d 141, 346 N.Y.S.2d 11 (3d Dep't 1973).

<sup>165</sup> CPLR 205(a) states that when an action is timely commenced and is terminated for any reason other than voluntary discontinuance, final judgment on the merits, or neglect to prosecute, the plaintiff may commence a new suit based on the same cause of action within six months after the termination. Since a dismissal under CPLR 3012(b) has been held to be a neglect to prosecute, a suit dismissed under that provision would not be entitled to the benefit of a CPLR 205(a) extension. Thus, should a CPLR 3012(b) dismissal occur after the statute of limitations has expired, the plaintiff will have no opportunity to recommence his suit. 7B MCKINNEY's CPLR 3012, commentary at 591 (1974).

warning required under the latter section.<sup>166</sup> Considering the possible consequences, a plaintiff who elects to serve a summons without a complaint would be well advised to speedily comply with the defendant's demand for service.

#### ARTICLE 32 — ACCELERATED JUDGMENT

*CPLR 3211(d): Court of Appeals adopts liberal approach in allowing discovery to oppose a motion to dismiss for lack of personal jurisdiction.*

At times, a party may seek to oppose a motion to dismiss a cause of action where "facts essential to justify opposition may exist but cannot then be stated."<sup>167</sup> In such instances, CPLR 3211(d) permits a court to order a continuance for disclosure of such facts.<sup>168</sup> This section has proven to be a particularly useful aid for plaintiffs attempting to establish jurisdiction under the long-arm statute.<sup>169</sup> Facts necessary to show sufficient New York contacts to confer jurisdiction thereunder are often exclusively within the control of the moving defendant. Without the aid of disclosure, a plaintiff, though diligent in his search for existing facts, would face eventual loss of his opportunity to litigate in a New York court.

In *Peterson v. Spartan Industries, Inc.*,<sup>170</sup> the Court of Appeals considered what burden a plaintiff need overcome to establish that sufficient facts supporting jurisdiction "may exist." Once having satisfied this burden, a nonresident defendant would be compelled to comply with a discovery and inspection notice.

The claim in *Peterson* arose when plaintiff was burned in New

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<sup>166</sup> CPLR 3216(b)(3) states that before an action can be dismissed for failure to prosecute pursuant to CPLR 3216(a), the court or the defendant seeking the dismissal must serve upon the plaintiff a written demand to resume the prosecution. Thereafter, plaintiff has 45 days to resume prosecution and file a note of issue. No such requirement applies to a motion for a CPLR 3012(b) dismissal. See 7B MCKINNEY'S CPLR 3012, commentary at 591-92 (1974).

<sup>167</sup> CPLR 3211(d) provides:

Should it appear from affidavits submitted in opposition to a motion [to dismiss a cause of action or defense] that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion, allowing the moving party to assert the objection in his responsive pleading, if any, or may order a continuance to permit further affidavits to be obtained or disclosure to be had and may make such other order as may be just.

<sup>168</sup> Prior to enactment of the CPLR, the courts were in conflict. However, the weight of authority favored interpreting CPA 307 as not allowing an examination before trial of a defendant in order to oppose a motion to dismiss. Compare *Loonsk Bros., Inc. v. Mednick*, 246 App. Div. 464, 285 N.Y.S.2d 801 (4th Dep't 1935) (allowing a preliminary examination), with *Standard Foods Prods. Corp. v. Vinas Unidas S.A.*, 200 Misc. 590, 104 N.Y.S.2d 596 (Sup. Ct. Kings County 1951) (no authority exists for taking a deposition of a party for use upon a motion before trial).

<sup>169</sup> CPLR 302.

<sup>170</sup> 33 N.Y.2d 463, 310 N.E.2d 513, 354 N.Y.S.2d 905 (1974).